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In the Supreme Court of the United States

OCTOBER TERM, 1959

EUGENE C. JAMES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,

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Assistant Attorney General,
Department of Justice,
Washington 25, D. C.

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MEMORANDUM FOR THE UNITED STATES

After a trial to the court—a jury having been waived—petitioner was convicted of wilfully attempting to evade and defeat the payment of income taxes for the years 1951 through 1954, in violation of Sections 145(b) and 7201 of the Internal Revenue Codes of 1939 and 1954, respectively. The conviction was affirmed by the Court of Appeals (273 F. 2d 5) on December 29, 1959 (Pet. Appendix 1a-4a). On February 8, 1960, the court below granted petitioner leave to file a petition for rehearing out of time.

(Pet. Appendix 5a).[1] A petition for rehearing, filed on February 12, 1960, was denied on February 29, 1960 (Pet. Appendix 6a). The petition for a writ of certiorari was filed on March 26, 1960.

The petition presents a single question: Whether funds which the trial court concluded were embezzled by petitioner nonetheless constitute taxable gains to him in the years in which misappropriated.[2]

In *Commissioner* v. *Wilcox*, 327 U. S. 404, this Court held that funds which the taxpayer had been convicted of embezzling did not constitute taxable income. Six years later, in *Rutkin* v. *United States*, 343 U. S. 130, the Court, ruling that an unlawful gain, as well as a lawful one, constitutes taxable income when its recipient has the actual use and benefit of it, held that money obtained by extortion was taxable gain. In so holding, this Court said of *Wilcox*, (*id.*, p. 138): "We do not reach in this case the factual situation involved in *Commissioner* v. *Wilcox*. * * * We limit that case to its facts." Both courts below, relying on *Rutkin*,[3] held that the funds

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[1] On February 3, 1960, petitioner filed, out of time, a motion in the court below, supported by affidavits, "for an order extending the time for filing a Petition for Rehearing * * * for five (5) days from the time this motion is acted upon". The motion was granted on February 8, 1960 (Pet. Appendix 5a), and the petition for rehearing was filed on February 12, 1960.

[2] The facts—many of which were stipulated—were found specially by the trial court and are not in dispute.

[3] See, also, *Commissioner* v. *Glenshaw Glass Co.*, 348 U. S. 126; *Commissioner* v. *Lo Bue*, 351 U. S. 243; cf. *Commissioner* v. *Jacobson*, 336 U. S. 28.

involved here, although misappropriated, were nonetheless taxable gains falling within the broad sweep of gross income as defined by Congress[4] and interpreted by this Court. They concluded that *Rutkin*, in effect, overruled *Wilcox*.

Petitioner, contending (Pet. 14-28) that *Wilcox* governs, alleges that the decision below is in conflict with that case, with the decision of the Court of Appeals for the Second Circuit in *J. J. Dix, Inc.* v. *Commissioner*, 223 F. 2d 436, certiorari denied, 350 U. S. 894, and with the decisions of the District Courts in *United States* v. *Peelle*, 159 F. Supp. 45 (E.D. N.Y.), and *United States* v. *Green* (D. Mass.), decided March 31, 1959.

We believe that the decision below is correct and that the rule of the *Rutkin* case is applicable to all gains, lawful or otherwise, which the recipient uses and enjoys, whatever the means by which acquired. The several Courts of Appeals which have had occasion to pass on the taxability of unlawful gains of various kinds in the light of *Rutkin* have so applied it,[5] with the exception of *Dix*. We agree that there is a conflict with *Dix*, in which the Court of Appeals for the Second Circuit, in a split decision, reversed

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[4] Sections 22(a) and 61(a) of the Internal Revenue Codes of 1939 and 1954, respectively.

[5] See *Kann* v. *Commissioner*, 210 F. 2d 247 (C. A. 3d), certiorari denied, 347 U. S. 967; *Briggs* v. *United States*, 214 F. 2d 699 (C. A. 4th), certiorari denied, 348 U. S. 864; *Davis* v. *United States*, 226 F. 2d 331 (C. A. 6th), certiorari denied, 350 U. S. 965; *Schira* v. *Commissioner*, 240 F. 2d 672 (C. A. 6th); *Macias* v. *Commissioner*, 255 F. 2d 23 (C. A. 7th); *Prokop* v. *Commissioner*, 254 F. 2d 544 (C. A. 7th); *United States* v. *Wyss*, 239 F. 2d 658 (C. A. 7th);

the Tax Court and held that funds which were diverted by an officer from a corporation were embezzled and were nontaxable receipts under *Wilcox*.[6]

The decision below is also contrary to decisions of the District Courts in *United States* v. *Green*, *supra*; *United States* v. *Peelle*, *supra*; and *United States* v. *Keam* (E.D. Ky.), decided December 10, 1958. The *Green* and *Keam* cases were prosecutions for tax evasion in which judgments of acquittal were granted on the authority of *Wilcox*; the *Peelle* case was a civil proceeding. In both the *Green* and *Peelle* cases, it was held that funds diverted by an officer stockholder from a closely held corporation were embezzled and hence were not taxable gains under *Wilcox*. In *Keam*, it was held that funds which the defendant diverted from a partnership, of which he was an equal partner with his two sons, were embezzled and therefore nontaxable receipts under *Wilcox*. Two other District Court cases express the view that *Wilcox* has continuing vitality. See *United States* v. *Mavroleon* (S.D. N.Y.), decided April 15, 1958 (1 A.F.T.R. 2d 1478), and *United States* v. *Goodman*, 178 F. Supp. 338 (E.D. Va.).

Rollinger v. *United States*, 208 F. 2d 109 (C. A. 8th); *Marienfeld* v. *United States*, 214 F. 2d 632 (C. A. 8th), certiorari denied, 348 U. S. 865; *Berra* v. *United States*, 221 F. 2d 590 (C. A. 8th), affirmed without discussion of this point, 351 U. S. 131; *Hartman* v. *United States*, 245 F. 2d 349 (C. A. 8th); *Smith* v. *United States*, 257 F. 2d 132 (C. A. 10th).

[6] Compare the *Dix* case with the Second Circuit's earlier decision in *United States* v. *Bruswitz*, 219 F. 2d 59, certiorari denied, 349 U.S. 913.

In view of the conflict between the instant case and the Second Circuit's decision in the *Dix* case and the need for settling the status of the *Wilcox* case in the light of subsequent holdings, the Government does not oppose the granting of the writ.

Respectfully submitted,

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APRIL, 1960.

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